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IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

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September Term, 2003

No. 597

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JAMES P. HENNESSY,

Appellant

v.

MONTGOMERY COUNTY, MARYLAND,

Appellee

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On Appeal from the Circuit Court for Montgomery County, Maryland  
(William J. Rowan, III, Judge)

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**BRIEF OF APPELLEE**

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## STATEMENT OF THE CASE

This appeal arises from a challenge to the selection process used by the Montgomery County Police Department for seven promotions to police captain positions in 2000. The sole issue before this Court is whether a flaw in a promotional process entitles an applicant to a promotion, regardless of the surrounding circumstances and the impact on the entire group of applicants.<sup>1</sup>

Hennessy filed a grievance claiming that the selection process for promotions to the captain position did not adhere to merit system requirements. As a remedy, he requested a retroactive promotion, back pay, and benefits. (E. 1-5) The grievance followed the required levels of review by the Office of Human Resources and the Chief Administrative Officer, and then reached the Merit System Protection Board. (E. 6-40)

The merit board agreed with Hennessy that four defects occurred in the selection process, although his other claims did not prove as sound. (E. 139-145) The board directed the County to ensure that the same mistakes did not recur, but declined to grant Hennessy's request for a retroactive promotion. Instead, the board awarded Lt. Hennessy priority consideration in future promotions. (E. 145) Hennessy filed a petition for judicial review and renewed his request for retroactive promotion, back pay, and benefits.

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<sup>1</sup>Hennessy seeks a promotion only for himself, despite the other candidates who participated in the process and did not receive a promotion. Using Hennessy's reasoning, every candidate in a flawed promotional process could claim an entitlement to the promotion based on the flaw. Carried to its illogical result, Hennessy's argument would require eight promotions for seven vacancies.

The Circuit Court for Montgomery County affirmed the merit board's decision, and Hennessy filed a timely appeal to this Court. (E. 223-224)

### **QUESTION PRESENTED**

Did the merit board satisfy merit system principles when it determined that retroactive promotion should be used as a remedy only when a person would have been promoted but for a flaw in the promotional process?

### **STATUTES, ORDINANCES AND CONSTITUTIONAL PROVISIONS**

The full text of all relevant statutes, ordinances and constitutional provisions appears in the appendix to this brief.

### **STATEMENT OF ADDITIONAL FACTS**

To protect against political influence and favoritism and to assure that its employees are highly competent, Montgomery County adopted a merit system. Montg. Co. Charter § 401; Montg. Co. Code § 33-5 (1994, as amended). As part of its merit system, the County created processes and procedures to test its police officers for promotional opportunities.<sup>2</sup> These processes and procedures attempt to determine the level of qualification of each applicant within a group of applicants for a promotional opportunity that is currently available or one that may become available. The officers who pass the examination are classified as “well qualified” or “qualified” and their names

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<sup>2</sup>The promotional opportunities available to employees in non-public safety positions usually include competition for the position with applicants from outside county government. *See* Montg. Co. Pers. Regs. § 33.07.01.06. The police department limits most of its promotional opportunities to people who are already members of the department. The County believes the process used for police promotions conforms to merit system principles.

appear alphabetically within those classifications on an “eligible list.” (E. 75) The police chief usually selects an officer from the well-qualified category for promotion.<sup>3</sup> Montg. Co. Pers. Regs. 33.07.01.07 § 7-1. The eligible list lasts for a set period of time—in this case, one year. *Id.* at 33.07.01.06 § 6-8. When the time expires, the process starts again, and officers who were not selected from the list must take another examination.

In the present case, Lt. Hennessy took the examination for promotion to captain, attained the eighth highest score, and classified well-qualified on the eligible list. (E. 72) The police department used a selection process known throughout the country as “the rule of five,” under which the appointing authority has the opportunity to consider five candidates for each vacancy from among the applicants. Under this method, five names are submitted for one vacancy, six names for two vacancies, and so on. As part of the process, a recommendation committee evaluated the top five scoring candidates from the eligible list and presented their comments and recommendation to the chief for selection. (E. 76) The evaluation included interviews with the candidates and review of resumes, personnel files, and internal affairs summaries. The chief then considered the information available to the committee along with the recommendation and decided which person to promote. (E. 77) The chief’s decision as to which individual to promote fell within the

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<sup>3</sup>The chief may select an officer from the qualified category over an individual in the well qualified category, but may do so only with the approval of the Chief Administrative Officer and for substantiated reasons. *See* Montg. Co. Pers. Regs. 33.07.01.07 § 7-1.

chief's sole discretion, provided he selected one of the candidates under consideration. (E. 76-77)

Using this "rule of five," the chief considered five applicants for several vacancies during the first six months of the effective period of the 2000 eligible list. (E. 42, 66, 68, 73) The personnel bulletin provided that the recommendation committee would interview an applicant the first time a vacancy occurred, and then only if more than six months elapsed between the initial interview and the next vacancy. (E. 77) This meant that, once the first set of promotions were made, the committee did not have to interview the four individuals who remained on the list, but only had to interview the next person on the eligible list and determine whether to recommend one or more of those on the new list of five. For each vacancy, the chief had a list of five names from which to make his selection for promotion.<sup>4</sup> (E. 42, 66, 68, 73) The committee interviewed the candidates on each list, reviewed the same materials for each person, and considered the same guidelines in relation to each applicant.<sup>5</sup> (E. 16, 17, 19, 21, 26, 27)

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<sup>4</sup>Despite the merit board's finding that the committee should have submitted nine names for the first five promotions, the record revealed that the fifth vacancy was to be filled by an individual based on the disposition of a prior grievance. (E. 11, 73)

<sup>5</sup>Hennessy emphasizes the inadequacy of the forms completed by the committee members, but the merit board recognized that the committee conducted its consensus reviews appropriately and that the deliberations performed by the committee were not "easily reduced to writing." (E. 141) The board disposed of Hennessy's complaint by finding that "the lack of further documentation of the consensus reaching process *provides no basis for finding the process defective.*" (emphasis added) (E. 141)

Recognizing the likelihood of a vacancy occurring in the near future, the recommendation committee compiled a list by assessing its view of the relative merits of each candidate, just as it would have done had there been an immediate vacancy, and saved the time of reconvening. (E. 42-43) This list was called “the future vacancy list.”<sup>6</sup> Because they were not required to reinterview candidates for recommendation if the last interview occurred within the preceding six months, the process the committee used technically conformed to the personnel bulletin. (E. 76) Although the merit board found that this violated the procedure outlined in the personnel bulletin, the defect identified by the board was that the bulletin did not specify that the committee could prepare a list before a vacancy actually existed. (E. 141)

Each time the chief considered people for the promotion to captain, he considered Hennessy, whose name appeared on the lists under the rule of five for each promotion. (E. 42, 66, 68) Because the eligible list contained ten well-qualified candidates and six qualified candidates, the seven vacancies that occurred during the effective period of the eligible list would leave three well-qualified candidates without promotions. (E. 72) As a practical matter, the rule of five approach would always leave four unhappy candidates. And in this case, by the time the eligible list expired, neither the highest scoring person in the well-qualified category nor Hennessy, the eighth ranked candidate, convinced the

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<sup>6</sup>Both forms reflect consideration of the same materials, with one referring to current vacancies and the other referring to vacancies occurring during the next six months. (E. 42, 68)

chief to promote them from the 2000 eligible list.<sup>7</sup> (E. 15, 43, 66, 68, 72-74) The chief explained that “the entire group of candidates was qualified for the job,” but there were not enough positions for everyone, so “he did what he thought was best for the organization.” (E. 14)

## **ARGUMENT**

### ***Standard of review***

Judicial review of an administrative decision requires the court to determine whether the decision is “in accordance with the law or whether it is arbitrary, illegal, and capricious.” *Moseman v. County Council*, 99 Md. App. 258, 262, 636 A.2d 499, 501, *cert. denied*, 335 Md. 229, 643 A.2d 383 (1994) (citations omitted). The reviewing court will not substitute its judgment for that of the agency when the issue is fairly debatable and the record contains substantial evidence to support the administrative decision. *United Parcel Service, Inc. v. People’s Counsel for Baltimore County*, 336 Md. 569, 576-577, 650 A.2d 226, 230 (1994). The court may substitute its judgment only as to an error made on an issue of law. *Columbia Road Citizens’ Association v. Montgomery County*, 98 Md. App. 695, 698, 635 A.2d 30, 32 (1994).

Decisions of agencies are entitled to the greatest weight and to a presumption of validity, viewing the decision in the light most favorable to the agency. *Board of*

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<sup>7</sup>To make sure that the last list had 5 names for consideration, the committee had to dip into the qualified category. (E. 66, 72) Hennessy does not challenge the inclusion of the qualified individual on the last recommendation.

*Physician Quality Assurance v. Banks*, 354 Md. 59, 68-69, 729 A.2d 376, 381 (1999). Substantial evidence has been described as “more than a ‘scintilla of evidence,’ such that a reasonable person could come to more than one conclusion.” *Relay Improvement Association v. Sycamore Realty Co.*, 105 Md. App. 701, 714, 661 A.2d 182, 188 (1995), *aff’d*, 344 Md. 57, 684 A.2d 1331 (1996) (citations omitted). Moreover, the agency resolves any conflicting evidence, as well as any inconsistent inferences, from such evidence. *Wisniewski v. Department of Labor, Licensing and Regulation*, 117 Md. App. 506, 517, 700 A.2d 860, 866 (1997) (citations omitted).

When reviewing administrative decisions, this Court’s role is precisely the same as that of the circuit court—to apply the substantial evidence test to the agency’s decision and to determine whether the agency’s decision is legally correct. *Maryland Insurance Administration v. Maryland Individual Practice Association*, 129 Md. App. 348, 355, 742 A.2d 22, 25-26 (1999). The agency’s order will be upheld on judicial review “if it is not based upon an erroneous determination of law, and if the agency’s conclusions reasonably may be based upon the facts proven.” *Montgomery County v. Buckman*, 333 Md. 516, 519 n.1, 636 A.2d 448, 450 n. 1 (1994) (citations omitted).

This appeal does not challenge the merit board’s findings and conclusions, but disputes only the remedy awarded to Hennessy. While the merit board agreed with Hennessy that certain irregularities had occurred in the selection process, the board did not consider any of the defects to require a retroactive promotion. Instead, the board directed the County to correct the problems in the future and to give Hennessy priority

consideration if he applied for promotion again. The board's decision was consistent with merit system principles that seek to ensure all employees a fair opportunity to compete for promotion, and the circuit court properly upheld the board's ruling.

**The merit board satisfied merit system principles when it determined that retroactive promotion should be used as a remedy only when a person would have been promoted but for a flaw in the promotional process.**

The merit board determined that a retroactive promotion constitutes the appropriate remedy when a person who otherwise would have been promoted proves that some defect in the process or some illegal act prevented the promotion from occurring. Implicitly, the merit board recognized the impropriety of that remedy in cases like this where the employee cannot show entitlement to the promotion. Had the "rank order" promotional process been used and a person who ranked lower than the grievant been promoted, retroactive promotion might constitute an appropriate remedy. The "rank order" process allows no discretion—a person's score and ranking on the list determines in what order a person will be promoted. The next person on the list gets the next promotion. Under a system that allows discretion in the promotional selection process, however, awarding a retroactive promotion to one out of several applicants is not so simple.

In this case, Hennessy's retirement makes his demand for retroactivity all the more unsettling. Being retired, he would not have to complete the period of probation that other promoted individuals must fulfill. Being retired, he would not serve the people of Montgomery County by performing the duties of a police captain. Instead, a retroactive

promotion in this case would simply enhance Hennessy's retirement benefits without the normal risks that accompany police duty.

The circumstances of the present case did not warrant a retroactive promotion. The board did not consider any of the errors to have caused Hennessy's failed promotion attempts. Indeed, the errors noted by the board applied equally to all of the candidates. Under Hennessy's reasoning, all ten well-qualified individuals should be promoted to the seven positions. More importantly, the board did not find that if the errors had not occurred Hennessy would have been found by the chief to have been the best qualified candidate for promotion. Nor did the board find any evidence of cronyism or favoritism in the process. The merit board acted in accordance with the merit system when it declined to grant Hennessy a retroactive promotion.

***The merit board has broad discretion to decide the appropriate remedy for a violation of the merit system.***

As an administrative agency, the merit board has only the authority specified by statute. *See Adamson v. Correctional Medical Services*, 359 Md. 238, 250, 753 A.2d 501, 507 (2000). Among its powers, the merit board has broad discretion to determine an appropriate remedy for a violation of the merit system law. The County law does not mandate a particular remedy in any instance, but includes a list of possible awards, leaving the sole discretion for selecting a remedy to the board. Montg. Co. Code § 33-14(c). A catch-all provision even permits the board to order "such other and further relief as may be deemed appropriate consistent with the charter and laws of Montgomery

County.” *Id.* at § 33-14(c)(10). Nothing in the merit system law mandates a retroactive promotion, but rather, the law permits the board to award an appropriate remedy.

Indeed, the argument that retroactive promotion remedies flaws in the promotional process without evidence of entitlement appears antithetical to merit system principles. Courts in New York have recognized this paradox. Generally, a person who passes a competitive examination does not acquire a right to the promotion, but only a right to be fairly considered for the position. *Andriola v. Ortiz*, 82 N.Y.2d 320, 324-325, 624 N.E.2d 667, 669-670 (1993). To require retroactive promotion alters the balance between an employee’s right to be fairly considered and the appointing authority’s discretion in selecting an applicant for promotion from a group of qualified individuals. *See Matter of Professional, Clerical, Technical Employees Association*, 90 N.Y.2d 364, 683 N.E.2d 733 (1997). Retroactive promotion in these instances would violate the strong policy favoring discretionary appointments. Instead, the appropriate remedy for defects in the promotional process is to allow reconsideration after the defects are corrected. *Greco v. Department of Personnel*, 226 A.D.2d 105, 640 N.Y.S.2d 509 (1996).

In Montgomery County, the merit board has broad discretion to exercise its remedial authority, as long as it does so consistently with the merit law. Montg. Co. Code § 33-14(c)(10). Nothing in the County Code requires the board to grant a retroactive promotion, especially if the board does not deem it the appropriate remedy. When a defect occurs in a promotional selection process, the merit board has the sole discretion to decide whether retroactive promotion, or some other form of relief, is the appropriate

remedy. *See Montgomery County v. Anastasi*, 77 Md. App. 126, 139, 549 A.2d 753, 759 (1988) (*Anastasi I*). This ability to choose the appropriate remedy—or even to decide that no remedy is needed—differs from a situation where an administrative decision maker declines to grant a requested remedy based on a mistaken belief that the decision maker does not have the authority to do so. *Baltimore Teachers Union v. Mayor and City Council of Baltimore*, 108 Md. App. 167, 186, 671 A.2d 80, 89, *cert. denied*, 342 Md. 472, 677 A.2d 565 (1996) (citation omitted). Nor does an award of a remedy other than what the grievant requests amount to a failure to exercise the discretion required by law. *See Maryland State Retirement Agency v. Delambo*, 109 Md. App. 683, 690-91, 675 A.2d 1018, 1022 (1996).

To fulfill its duty to protect an employee's rights under the merit system, the merit board typically fashions a remedy that ensures fairness to all members of the merit system, not just the rights of a particular individual grievant. Montg. Co. Code § 33-7(a). Although retroactive promotion may be appropriate in some cases, this remedy usually applies only to circumstances where the grievant would have received the promotion if the process had been conducted properly. Retroactive promotion is a radical form of relief, because it forces the appointing authority to work with an individual who may not be the best qualified for the tasks involved. Although retroactive promotion may be appropriate when a rank-order method of selection is used, it almost never will be appropriate where the appointing authority retains discretion to select anyone from the well-qualified category. *See* Montg. Co. Pers. Regs. 33.07.01.07 § 7-1(a).

Where an agency has adhered to a consistent and long-standing interpretation of a statute that it administers, the court will acknowledge the agency's expertise and defer to the agency's construction. *Marriott Employees Federal Credit Union v. Motor Vehicle Administration*, 346 Md. 437, 445, 697 A.2d 455, 459 (1997). The reviewing court will give the greatest weight to an agency's interpretation and application of a statute. *Annapolis Marketplace, LLC v. Parker*, 369 Md. 689, 703, 802 A.2d 1029, 1037 (2002) (citations omitted). Of course, no deference will be given to an interpretation that conflicts with a clear and unambiguous statute. *Marriott Employees Federal Credit Union*, 346 Md. at 446, 697 A.2d at 459 (1997) (citing *Falik v. Prince George's Hospital*, 322 Md. 409, 416, 588 A.2d 324, 327 (1991)). But statutory construction principles encourage this Court to interpret a statute to promote the legislative intent and admonishes a court to avoid illogical constructions. *See Armstead v. State*, 342 Md. 38, 56, 673 A.2d 221, 229 (1996), and *Frost v. State*, 336 Md. 125, 137, 647 A.2d 106, 112 (1994), respectively. A court may not add words to the statute or otherwise distort its clear meaning. *Blind Industries and Services v. Department of General Services*, 371 Md. 221, 231, 808 A.2d 782, 788 (2002).

The merit board has consistently granted retroactive promotions only when the error in the promotional process directly caused a candidate's non-promotion. For example, when the absence of established guidelines and procedures made the rank-order method of selection the only reasonable approach, the board awarded retroactive promotions to those individuals who would have received promotions if rank order had

been applied in the first place. (E. 225-228) Similarly, where the settlement of other grievances prevented several applicants from receiving promotions, the board awarded the applicants retroactive promotions. (E. 229-234) In each instance, the board exercised its discretion in determining an appropriate award and granted a promotion only where the board concluded that the grievant would have been promoted but for the flaw found in the promotional process. When this direct correlation did not exist, the board awarded priority consideration for the next vacancy. (E. 147-149)

Contrary to Hennessy's view, the broad remedial powers granted to the merit board do not require the board to order a retroactive promotion. Montg. Co. Code §§ 33-7(a) and 33-14(c)(1). The fact that the merit board "shall have authority to order appropriate relief to accomplish the remedial objectives" of the merit system law does not make the grant of a retroactive promotion mandatory. Montg. Co. Code § 33-14(c). The board properly considered alternative remedies, including whether to order that "priority consideration be given to an employee found qualified before consideration is granted to other candidates." Montg. Co. Code § 33-14(c)(3).

In this case, the record before the merit board contained substantial evidence to support the board's findings that all of the unsuccessful candidates for promotion to captain from the 2000 eligible list experienced the same harm by virtue of the procedural defects in the selection process, but none of the unsuccessful candidates could say that without the defects any of them would have been promoted instead of those who were promoted. The board viewed the exercise of its authority to order a retroactive promotion

as appropriate only if Hennessy would have been promoted absent the discrepancies. Because the police chief considered multiple names for each vacancy, however, the record did not establish that Hennessy had any less chance than the other candidates of being promoted due to the incomplete recommendation panel notes or the incomplete lists submitted to the chief. The merit board reasonably determined that retroactive promotion of Hennessy would not treat all promotional candidates fairly.

The fact that Hennessy retired does not make him more eligible for a retroactive promotion—he chose to leave County employment before the merit board issued its decision. The board had to treat all applicants fairly, and granting Hennessy a retroactive promotion because he had retired would not prove fair to the unsuccessful candidates who remained in County employment.<sup>8</sup> Priority consideration provided a consistent remedy for those who remained employed, and the ability of a retiree to apply for reappointment made it a realistic remedy for Hennessy as well. Montg. Co. Pers. Regs. 33.07.01.07 § 7-4. Alternatively, the board could have concluded that no remedy was due to Hennessy. The evidence did not show that the defects in the selection process prevented him from being promoted, and the County was directed to correct the discrepancies in the future. As in *Andre v. Montgomery County Personnel Board*, the board did everything it could

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<sup>8</sup>The individual who scored highest on the examination had not been promoted and arguably would apply again in the next process. (E. 11, 72) Certainly, Hennessy could not claim priority over this individual and remain consistent with his contention that the process somehow required the use of rank order once the list of five was submitted to the police chief.

do when it directed the County to ensure a uniform process in the future, but did not order a retroactive promotion. (E. 145) 37 Md. App. 37, 63, 375 A.2d 1149, 1157 (1977).

Hennessy did not prove the casual, unrecorded process, with a danger of cronyism, favoritism, or some other kind of unequal treatment needed to successfully invalidate the promotion process. *Anastasi v. Montgomery County*, 123 Md. App. 472, 486, 719 A.2d 980, 987 (1998) (*Anastasi II*). Instead, Hennessy showed that some discrepancies had occurred, and that improvements were needed, but none of the “flaws” amounted to violations of the merit system that required retroactive promotion. Hennessy was included on each list given to the police chief, and the personnel regulations permitted the chief to select anyone from the well-qualified category. The recommendation committee considered the same information for each candidate and conducted interviews in accordance with the personnel bulletin. Under these circumstances, the merit board would have committed reversible error if it had ordered Hennessy’s promotion.

***The purpose of the merit system is satisfied when candidates have a fair opportunity to compete for the promotion.***

This Court has recognized that the merit system does not guarantee a promotion, but protects “the opportunity of employees to compete fairly for promotion.” *Prince George’s County v. O’Berry*, 133 Md. App. 549, 552, 758 A.2d 632, 633 (2000). Even when a flaw is found in an examination or the process used for promotion, “[t]he potential for promotion is what was wronged, not a right to promotion.” *Andre*, 37 Md. App. at 62, 375 A.2d at 1156.

When a promotional examination process suffers extreme flaws, fairness may dictate that the department repeat the promotional process and refrain from making any further promotions until the process is corrected. *See O'Berry, supra*. As this Court has explained, *all* officers participating in an invalid promotional process suffer, not just those who file grievances:

Like all other police officers who are potential victims of a promotional process proven to be flawed, appellees were entitled to a ruling by . . . the circuit court . . . that would (1) require that the promotional process be corrected so that no candidate for promotion would have an unfair advantage over any other candidate, and (2) prohibit the appointing authority from promoting (appellees or) any (other) candidate until a fair promotional process has been conducted.

*Id.* at 557, 758 A.2d at 636.

A complaint that the selection process violated an applicant's rights under the merit system receives intense scrutiny. Thus, when the police chief consulted information inconsistently among the candidates and in a manner that had not been made public in the personnel bulletin, this Court held that the process violated the applicant's merit system rights. *See Anastasi I, supra*. In that case, the police department failed to inform the promotional candidates that the police chief would appoint a selection panel to assist him in reviewing the candidates. Nor did the department provide background material on each candidate to the chief and the senior command staff to enable them to evaluate each candidate fairly. 77 Md. App. at 130, 549 A.2d at 755. These deficiencies appeared to unfairly favor the few candidates who were personally known by the upper-level managers. *Id.* at 135, 549 A.2d at 757. This Court, therefore, invalidated the selection

process because it failed to consider each candidate’s “relative abilities, knowledge, and skills” and ignored the mandates of Montg. Co. Code § 33-5 to ensure fair treatment of employees in making personnel decisions. *Id.*

After the decision in *Anastasi I*, the police department revised its process and, when this Court considered the new system, it approved the unwritten “rank order with exception” method of promotion.<sup>9</sup> *Anastasi II*, 123 Md. App. at 487-88, 719 A.2d at 988. Under the “rank order with exception” system, the selection panel discussed each candidate in relation to clear guidelines and the police chief promoted candidates in test score order, unless a problem (*e.g.*, disciplinary action) disqualified the candidate. Unlike the prior undisclosed and inconsistent review, this newer method protected against favoritism and allowed for equal treatment of candidates. *Id.* at 488, 719 A.2d at 988.

Acknowledging that the department may use a reasonable level of discretion in the design and implementation of a system, this Court noted that the method must protect against “the deficiency ‘of appearing to grant favoritism to those few individuals who were personally familiar with the decision makers . . . .’” *Id.* (quoting *Anastasi I*, 77 Md. App. at 135, 549 A.2d at 753). Neither the *Anastasi* decisions nor the County Code mandated that the County always adhere to a rank-order-with-exception method of

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<sup>9</sup>In addition to specifying the information that would be considered for each candidate, the County amended its personnel regulations to provide clear discretion to the police chief: “Consistent with equal employment opportunity policies, the department director may choose any individual from the highest rating category.” Montg. Co. Pers. Regs. 33.07.01.07 § 7-1(a).

selection. Rather, the promotional system meets the merit system requirements when the review panel follows clear guidelines and considers the same materials for each candidate.

The rule of five method used in the present case meets these parameters of fairness. While the merit system requires that promotions be based on employees' "relative abilities, knowledge and skills," this does not eliminate all discretion in promotion decisions. Montg. Co. Code § 33-5(b)(2). As recognized by the Court of Appeals of Washington when it upheld the rule of five, "[t]he Chief of Police. . .does not have to promote candidates in the order in which they appear on the certification. . .[but] has discretion to promote any candidate on the certification." *Seattle Police Officers Guild v. City of Seattle*, 113 Wn. App. 431, 435-436, 53 P.3d 1036, 1038 (2002). The Court further declared the rule of five to be an acceptable way to comply with the law. *Id.* at 439, 53 P.3d at 1040. In approving a rule of three approach, the Court of Appeals of New York emphasized the need for the appointing authority to have discretion in making a promotion selection, because "examination success cannot reveal any possible defects of personality, character or disposition which may impair the performance of one's duties in a civil service position. . . ." *Matter of Professional, Clerical, Technical Employees Association*, 90 N.Y.2d at 375, 683 N.E.2d at 738 (citation omitted).

Hennessy asks this Court to rob the police chief of this important discretion and to order Hennessy's promotion as a remedy for flaws in the selection process that affected *all* candidates. To do so would violate fundamental merit system principles of fairness.

The board properly concluded that retroactive promotion would not constitute an appropriate remedy in this case.

***This Court has upheld past refusals to promote a candidate where it remained unclear that the individual would have been promoted absent the error.***

On more than one occasion, this Court has agreed with the merit board that promotional candidates aggrieved by flaws in an examination or selection process do not necessarily become entitled to retroactive promotions, especially when numerous applicants could be affected. In *Andre*, the merit board had found serious defects in the promotional selection process for positions in the County's Department of Recreation. 37 Md. App. at 58 n.2, 375 A.2d at 1154 n.2. The aggrieved employees requested either retroactive promotions or noncompetitive promotions to the next available similar positions. 37 Md. App. at 59, 375 A.2d at 1155. But they had not shown that they would have been promoted in the absence of the defects in the selection process. 37 Md. App. at 61, 375 A.2d at 1156. The merit board instead directed the County to correct the deficiencies in future promotional processes. *Id.* at 63, 375 A.2d at 1157. This Court concluded that the merit board appropriately denied the effectively noncompetitive promotions, because doing so "was not in the best interest of the County service." *Id.* at 62, 375 A.2d at 1157. Moreover, the individuals who received promotions were seemingly eligible for those positions and had not been included as parties. *Id.* at 63, 375 A.2d at 1157.

Similarly, retroactive promotion did not apply in either of the *Anastasi* cases. In *Anastasi I*, this Court found clear violations of the merit system by the use of different materials and recommendations for various applicants. 77 Md. App. at 133, 549 A.2d at 756. The Court did not instruct the merit board that it had to award back pay, promotions, or any particular relief, but left the choice of the appropriate remedy to the board, reminding it to protect the merit system law. *Id.* at 139-140, 549 A.2d at 759-760. Later, in *Anastasi II*, this Court upheld the rank-order-with-exception method that had been adopted by the department for police promotions and, again, did not override the merit board's denial of retroactive promotion.<sup>10</sup> 123 Md. App. at 488, 719 A.2d at 988. This Court directed only that *Anastasi* have the opportunity to respond to the adverse memoranda and then to be considered for promotion during the next cycle. *Id.* at 490, 719 A.2d at 989. The decision regarding promotion remained within the department's authority as long as all procedural requirements were followed. *Id.* at 488, 719 A.2d at 988.

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<sup>10</sup>This Court discussed both of these cases in its decision in *Montgomery County v. Clarke*, Ct. Sp. App. No. 2580, Sept. Term, 2000 (unreported, filed December 5, 2001), *cert. denied*, 369 Md. 301, 799 A.2d 1262 (2002), where this Court disposed of similar flaws in consistency alleged by a candidate in the well-qualified category of an eligible list. The analysis in *Clarke* supported the department's ability to promote a candidate who did not have the highest test score without violating the merit system. While an unreported decision is not binding on the board, the analysis reflected the board's view in this case. In any event, the merit board's reference to an unreported decision had no effect on Hennessy's entitlement to a retroactive promotion.

The same reasoning was applied more recently in *Prince George's County v. O'Berry, supra*. The Prince George's County 1994 examination process for promotion to police sergeant was challenged by several unsuccessful candidates. *O'Berry*, 133 Md. App. at 551, 758 A.2d at 633. This Court agreed “that the promotional process was indeed flawed and should have been ‘redone . . . .’” *Id.* It did not matter how inconvenient repeating the procedure might be—fairness to the promotional candidates required it. 133 Md. App. at 557, 758 A.2d at 636. Relying on *Andre*, this Court explained that, where the applicants “were not entitled to retroactive promotion and back pay. . . . [a] ‘redone’ promotional process is the only relief available to unsuccessful candidates who are potential victims of a promotional process proven to have been flawed.” 133 Md. App. at 557 n.3, 758 A.2d at 636 n.3.

To grant a grievant a promotion (whether retroactive or prospective) as a remedy when defects have been found in a promotional process is not always appropriate, because the grievant receiving the promotion would then have “an unfair advantage over any other candidate” for the promotional opportunity. *O'Berry*, 133 Md. App. at 557, 758 A.2d at 636. Although Hennessy claims that “priority consideration” gives him effectively no remedy, he voluntarily retired while this case was pending before the merit board. Even after receiving the merit board’s decision, Hennessy could have requested reappointment to a lieutenant position under the personnel regulations. Montg. Co. Pers. Regs. 33.07.01.07 § 7-4. If he had done so, he would have been eligible for priority consideration for the next captain position. In light of the limited use of retroactive

promotion as a remedy, and the nature of the discrepancies the board found in the selection process, the remedy granted by the merit board was not meaningless. And the same reasons would have supported the board granting no remedy other than directing the County to correct the problems in the future. *See Andre, supra.*

## CONCLUSION

The merit board has broad discretion to grant an appropriate remedy for a violation of the merit system. Not every mistake warrants the specific remedies listed in the law, and this case reflects one of those instances. The rule of five selection process satisfied merit system principles of fairness, and the defects the merit board found in the department's use of the process needed to be corrected. But Hennessy was not entitled to a retroactive promotion as a result of the errors that occurred in the process. This Court should affirm the decision of the merit board.

Respectfully submitted,

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Statement pursuant to Maryland Rule 8-504(a)(8): This brief was prepared with proportionally spaced type, using Times New Roman font and 13 point type size.

## APPENDIX

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## **Excerpts from Montgomery County Charter**

### **§ 401. Merit System.**

The Council shall prescribe by law a merit system for all officers and employees of the County government except: (a) members of the Council, the County Executive, the Chief Administrative Officer, the County Attorney; (b) the heads of the departments, principal offices and agencies, as defined by law; (c) any officer holding any other position designated by law as a non-merit position; (d) one confidential aide for each member of the Council; (e) two senior professional staff members for the Council as a whole as the Council may designate from time to time; (f) three special assistants to the County Executive as the Executive may designate from time to time; (g) special legal counsel employed pursuant to this Charter; (h) members of boards and commissions; and (i) other officers authorized by law to serve in a quasi-judicial capacity.

Any law which creates a new department, principal office, or agency, or designates a position as a non-merit position, requires the affirmative vote of six Councilmembers for enactment. Any law which repeals the designation of a position as a non-merit position requires the affirmative vote of five Councilmembers for enactment.

Officers and employees subject to a collective bargaining agreement may be excluded from provisions of law governing the merit system only to the extent that the applicability of those provisions is made subject to collective bargaining by legislation enacted under Section 510, Section 510A, or Section 511 of this Charter.

The merit system shall provide the means to recruit, select, develop, and maintain an effective, nonpartisan, and responsive work force with personnel actions based on demonstrated merit and fitness. Salaries and wages of all classified employees in the merit system shall be determined pursuant to a uniform salary plan. The council shall establish by law a system of retirement pay.

The Council by law may exempt probationary employees, temporary employees, and term employees from some or all of the provisions of law governing the merit system, but the law shall require these employees to be recruited, selected and promoted on the basis of demonstrated merit and fitness.

## **Excerpts from Montgomery County Code**

### **§ 33-5. Statement of legislative intent; merit system principles; statement of purpose; merit system review commission; applicability of article.**

(a) Statement of legislative intent. It is the legislative intent of the county council that this article foster excellence in the public service; high individual competence among employees; recognition that respect for the employee as an individual is first required for achieving such excellence and competence; and harmonious and efficient operation within the various components of county government.

(b) Merit system principles. The merit system established by this chapter encompasses the following principles:

(1) All county government authority, including internal supervisory authority, is for service to the people, is derived from law and the people and must not be abused;

(2) The recruitment, selection and advancement of merit system employees shall be on the basis of their relative abilities, knowledge and skills, including the full and open consideration of qualified applicants for initial appointment;

(3) Merit system employees shall be provided compensation consistent with standard of comparability with other public agencies and the private sector;

(4) Merit system employees shall be provided training as needed to assure high quality performance and such training where possible should also provide increased opportunity to facilitate their career advancement;

(5) Merit system employees are encouraged to excel in their work performance; they shall be retained if they meet standards of satisfactory overall performance and shall be separated from merit system service if they do not; both supervisors and subordinates have an equal responsibility to facilitate work performance correction and improvement;

(6) All applicants to and employees of the county merit system shall be assured fair treatment without regard to political affiliation or other nonmerit factors in all aspects of personnel administration.

(7) Merit system employees shall be protected against any coercion to engage in illegal or improper actions or partisan political activities and shall be prohibited from using their official authority for the purpose of interfering with or affecting the result of an election or nomination for office;

(8) The merit system established under this chapter shall be interpreted in accordance with these principles.

(c) Statement of purpose. The basic purpose of this article is to delineate the respective responsibilities of the county executive, the chief administrative officer and the merit system protection board for personnel management in county government. It is the further purpose of this article to implement by law the county charter responsibilities of the county council with respect to a merit system generally, including provisions for salaries and wages of all classified employees of the merit system under a uniform salary plan, the merit system protection board's authority to exercise its appellate functions, and promotion of the overall objective that the integrity of the county merit system be preserved and that it be administered fairly and efficiently in the best interests of the county and its employees.

(d) Merit system review commission. In addition to the county council's legislative responsibilities authorized under sections 101 and 401 of the county charter, there shall be convened no later than July 1, 1980, and, if determined necessary in each instance by county council resolution, subsequently at intervals of four (4) years, a merit

system review commission, the functions of which are to strengthen the system of checks and balances among those officials and agencies of county government having merit system responsibilities and to examine and recommend legislative or administrative revision to the merit system in keeping with the intent of the county charter and this article and with new developments in the field of public administration and personnel management. The commission shall be an eleven-member body composed of appropriately qualified county citizens and established by a resolution of the county council. The county executive shall appoint five (5) of the members of this commission and the county council shall appoint the remaining members. Each commission shall terminate after it renders to the county council its final report.

(e) Applicability of article. This article shall apply to all merit system employees defined herein. Not included under this article unless specifically stated to the contrary are those positions excluded by section 401 of the county charter as amended and any other positions so excluded from the merit system under other provisions of county law.

### **§ 33-7. County executive and merit system protection board responsibilities.**

(a) Generally. In performing its functions, the board is expected to protect the merit system and to protect employee and applicant rights guaranteed under the merit system, including protection against arbitrary and capricious recruitment and supervisory actions, support for recruitment and supervisory actions demonstrated by the facts to be proper, and to approach these matters without any bias or predilection to either supervisors or subordinates. The remedial and enforcement powers of the board granted herein shall be fully exercised by the board as needed to rectify personnel actions found to be improper. The board shall comment on any proposed changes in the merit system law or regulations, at or before the public hearing thereon. The board, subject to the appropriation process, shall be responsible for establishing its staffing requirements necessary to properly implement its duties and to define the duties of such staff.

(b) Personnel regulations. The county executive shall adopt personnel regulations under method (1) of section 2A-15 of this Code.

The personnel regulations shall provide the framework for:

- (1) The classification of all merit system positions in the executive and legislative branches;
- (2) Minimum qualifications for merit system positions, methods of determining qualifications and methods of selection for any positions;
- (3) Probationary periods, promotions, transfers;
- (4) Causes for removal from any merit system position and methods of removal, including demotions, furloughs, and reduction of staff. However, any regulations governing a reduction in staff and employee rights attendant thereto shall be restricted to the respective branch of government in which the employee is employed; in the case of

the legislative and judicial branches, this sentence shall apply to employees hired by the legislative and judicial branch, respectively, after August 1, 1983.

- (5) Annual, sick and other leave;
- (6) Prohibitions against political activity;
- (7) Maintenance of personnel records; and
- (8) Similar personnel matters as may be provided by law.

(c) Classification standards. With respect to classification matters, the county executive shall provide by personnel regulation, adopted in the manner specified above, standards for establishing and maintaining a classification plan. These standards may include but are not limited to the following:

- (1) The necessary components of class specifications;
- (2) Criteria for the establishment of new classes, modification or elimination of existing classes;
- (3) Criteria for the assignment of positions to classes;
- (4) Kinds of data required to substantiate allocation of positions;
- (5) Guidelines for comparing levels of job difficulty and complexity; and
- (6) Criteria for the establishment or abolishment of positions.

The board shall conduct or authorize periodic audits of classification assignments made by the chief administrative officer and of the general structure and internal consistency of the classification plan, and shall submit audit findings and recommendations to the county executive and county council.

(d) Personnel regulation review. The merit system protection board shall meet and confer with the chief administrative officer and employees and their organizations from time to time to review the need to amend these regulations.

(e) Adjudication. The board shall hear and decide disciplinary appeals or grievances upon the request of a merit system employee who has been removed, demoted or suspended and in such other cases as required herein.

(f) Retirement. The board may from time to time prepare and recommend to the council modifications to the county's system of retirement pay.

(g) Personnel management oversight. The board shall review and study the administration of the county classification and retirement plans and other aspects of the merit system and transmit to the chief administrative officer, county executive and the county council its findings and recommendations. The board shall conduct such special studies and audits on any matter relating to personnel as may be periodically requested by the county council. All county agencies, departments and offices and county employees and organizations thereof shall cooperate with the board and have adequate notice and an opportunity to participate in any such review initiated under this section.

(h) Publication. Consistent with the requirements of the Freedom of Information Act, confidentiality and other provisions of law, the board shall publish, at least annually, abstracts of its decisions, rulings, opinions and interpretations, and maintain a permanent record of its decisions.

(i) Public forum. The board shall convene at least annually a public forum on personnel management in the county government to examine the implementation of charter requirements and the merit system law.

**§ 33-14. Hearing authority of board.**

(a) Hearing requirements. Hearings before the board are quasi-judicial in nature and shall be conducted in formal session in accordance with the provisions and authority contained in the county administrative procedures act. Board members shall be provided orientation and training as required to properly implement the requirements of the county administrative procedures act and conduct administrative evidentiary proceedings. With respect to hearings which go beyond one (1) session, the board shall endeavor to schedule such hearings so that a minimum amount of time elapses between sessions. When required for continuity and minimum loss of time in concluding a case, the board shall also endeavor to schedule hearings during daytime, weekday hours. Hearing shall be open to the public with reasonable notice, if requested by the employee.

(b) Board counsel. The board may request special counsel when the board and the county attorney determine that a representational conflict exists within the county attorney's office. The special counsel shall be an individual acceptable to the board. The county attorney may assign an attorney to the board as its general counsel who shall represent the board exclusively on matters concerning the merit system.

(c) Decisions. Final decisions by the board shall be in writing, setting forth necessary findings of fact and conclusions of law. A copy of such decision shall be furnished to all parties. The board shall have authority to order appropriate relief to accomplish the remedial objectives of this article, including but not limited to the following:

(1) Order retroactive promotion or reclassification with or without back pay;

(2) Order change in position status, grade, work schedule, work conditions and work benefits;

(3) Order priority consideration be given to an employee found qualified before consideration is given to other candidates;

(4) Order reinstatement with or without back pay, although the chief administrative officer may reinstate either to a position previously held or to a comparable position of equal pay, status and responsibility;

(5) Order cancellation of personnel actions found in violation of law or personnel regulation provided that such action may not without due process, adversely affect the employment rights of another employee;

(6) Grant employee participation in an employee benefit previously denied (training, educational program or assistance, preferential or limited work assignments and schedules, overtime pay or compensatory leave);

(7) Order removal from administrative or personnel records any reference or document pertaining to an unwarranted disciplinary or adverse personnel action;

(8) Order corrective measures as to any management procedure adversely affecting employee pay, status, work conditions, leave or morale;

(9) Order the county to reimburse or pay all or part of the employee's reasonable attorney's fees. The reasonableness of the attorney fees shall be determined by the following factors;

a. Time and labor required;  
b. The novelty and complexity of the case;  
c. The skill requisite to perform the legal service properly;  
d. The preclusion of other employment by the attorney due to acceptance of the case;

e. The customary fee;  
f. Whether the fee is fixed or contingent;  
g. Time limitations imposed by the client or the circumstances;  
h. The experience, reputation and ability of the attorneys; and  
i. Awards in similar cases;

(10) Order such other and further relief as may be deemed appropriate consistent with the charter and laws of Montgomery County.

## **Excerpts from Montgomery County Personnel Regulations**

### **33.07.01.06 Recruitment and Application Rating Procedures**

6-1. Recruitment and application rating. The CAO must administer a recruitment and application rating process for all merit system positions.

6-2. Announcement of open jobs.

(a) The OHR Director:

(1) must announce and distribute notice of vacant positions that are open for competition among qualified candidates;

(2) must include in a vacancy announcement information about job duties, minimum qualifications, the rating process including the rating criteria, and other requirements for the position;

(3) may announce a vacancy to the general public or may restrict the vacancy to some or all County employees; and

(4) must allow a Fire and Rescue Services merit system employee of a local fire and rescue department to apply for vacancy announcements that are limited to County employees only.

(b) A department director may determine if and when a vacant position will be announced.

6-3. Employment application deadline.

(a) The OHR Director may establish a reasonable deadline of not less than two weeks for receipt of applications for announced vacancies. In unusual circumstances, the OHR Director may shorten the two-week announcement period.

(b) The OHR Director may designate certain positions for open continuous or open until filled recruitment.

(c) The OHR Director must not accept an application submitted after an announced application deadline.

6-4. Review of applications. The OHR Director must review and evaluate an application submitted to determine if the applicant is eligible for the announced vacancy. The OHR Director may disqualify an applicant if:

(a) the applicant lacks required minimum qualifications such as education, experience, a license, or a certification;

(b) the applicant submits inaccurate or false information in the application or associated forms;

(c) the applicant was separated from prior County service for cause or is not eligible for re-hire;

(d) the applicant has prior unsatisfactory work performance relevant to the position applied for;

(e) there is evidence of a job-related factor that would hinder or prohibit the applicant's satisfactory performance of the duties and responsibilities of the position; or

(f) the applicant fails to comply with established procedures or reference and investigatory requirements.

6-5. Competitive rating process.

(a) The OHR Director must establish a competitive rating process to create an eligible list for employment or promotion, unless the OHR Director determines that a non-competitive process is appropriate under Section 6-6 or 27-3(b) of these Regulations.

(b) The OHR Director must include in the vacancy announcement in the jobs bulletin on the County Website or in the printed Montgomery County jobs bulletin a description of the competitive rating process and rating criteria that will be used to create the eligible list.

(1) The competitive rating process may include:

(A) a written or oral examination;

(B) a demonstration of a job-related physical ability or skill;

(C) an evaluation of an applicant's training, experience, and education; or

(D) another professionally acceptable assessment technique that fairly evaluates an applicant's qualifications, fitness, and ability.

(2) The competitive rating process must:

(A) result from a job analysis that documents the knowledges, skills, and abilities required to perform essential functions of the job;

(B) assess the employee's ability to perform important aspects of the job;

(C) be administered in good faith and without discrimination; and

(D) be properly and accurately conducted.

6-6. Noncompetitive rating process. The OHR Director may establish an eligible list for employment or promotion on a noncompetitive basis for positions involving unskilled manual labor and for other classes of work if a competitive process is impractical.

6-7. Invalidation of rating process. The CAO must invalidate a rating process in whole or in part if an improper act occurred or if the rating process was not job-related or was discriminatory.

6-8. Eligible list. After the rating process is complete, OHR must establish an eligible list with the names of all qualified individuals grouped in appropriate rating categories. The OHR Director must determine the length of time that an eligible list will be in effect and may extend or abolish an eligible list for good cause. If an eligible list is abolished before the expiration date on the eligible list, OHR must notify in writing all individuals whose names appear on the list.

6-9. Priority eligible list. The OHR Director may establish a priority eligible list to provide priority consideration in the following order to an employee who:

(a) is unable to perform the employee's job because of a disability or injury under the ADA;

(b) is subject to reduction-in-force; or

(c) has veteran's credit.

\* \* \*

6-11. Appeals by applicants. Under Section 33-9 of the County Code, a non-employee or employee applicant for a merit system position may file an appeal directly with the MSPB alleging that the decision of the CAO on the individual's application was arbitrary and capricious, illegal, based on political affiliation or other non-merit factors, or that the announced examination and scoring procedures were not followed.

**Office of Human Resources Editor’s note** – The subjects covered in this section of the Personnel Regulations are addressed for bargaining unit employees in the current collective bargaining agreements as indicated below:

Bargaining unit Articles of current agreements with references to recruitment or application rating procedures

\* \* \*

Police: 15, Hours and Working Conditions  
25, Transfers  
44, Promotions  
55, Job Sharing

\* \* \*

### **33.07.01.07 Appointments, Probationary Period, and Promotional Probationary Period**

7-1. Use of eligible list. If a department director determines that a vacant position should be announced as open for competition among qualified applicants, the department director must select an individual for appointment or promotion from an eligible list.

(a) Consistent with equal employment opportunity policies, the department director may choose any individual from the highest rating category.

(b) The department director must be able to justify the selection and must comply with priority consideration provisions in Sections 6-9, 6-10, and 30-4 of these Regulations.

(c) If the department director selects an individual from a lower rating category, the department director must justify the selection in writing. In cases where an individual from a higher rating category is bypassed, the department director’s selection is not final unless it is approved by the CAO.

7-2. Probationary period; promotional probationary period.

(a) Purpose of probationary period and promotional probationary period.

(1) A person appointed to a full-time or part-time merit system position must serve a probationary period as a continuation of the rating process to demonstrate proper attitude and ability for the position.

(2) A person appointed to a temporary position does not serve a probationary period.

(3) An employee promoted to a full-time or part-time merit system position must serve a promotional probationary period in order to demonstrate that the employee is able to perform the duties of the new job satisfactorily.

(b) Length of probationary period.

(1) The probationary period is 12 months for an employee newly appointed to a full-time or part-time position, unless the employee is appointed to an OPT/SLT bargaining unit position or is a police officer or deputy sheriff.

(2) The probationary period for an employee appointed to a full-time or part-time OPT/SLT bargaining unit position is 6 to 12 months, unless the employee is a deputy sheriff.

(3) The probationary period for a police officer or deputy sheriff continues for 12 months after the employee has sworn status.

(4) The promotional probationary period is 6 months for an employee newly promoted to a full-time or part-time position.

(c) Extension of the probationary period or promotional probationary period.

(1) The CAO may approve an extension of the probationary period or promotional probationary period for a person appointed or promoted to a full-time or part-time merit system position, up to 50 percent of the original probationary period.

(2) In extraordinary circumstances the CAO may approve a further extension not to exceed an additional 6 months. Extraordinary circumstances may include the employee's inability to complete the required probationary period within 18 months because of a medical condition that affects the employee's ability to perform the essential functions of the job.

(d) Evaluation and counseling during the probationary period or promotional probationary period. During the probationary period or promotional probationary period, a supervisor must observe an employee's work performance and explain to an employee whose work performance is marginal or inadequate the areas that need improvement and specific problems that the employee must resolve.

(e) Termination during probation of a probationary employee.

(1) A department director may immediately terminate a probationary employee at any time during the probationary period.

(2) A department director who terminates a probationary employee must ensure that the employee receives severance pay as follows:

(A) 2 weeks if the employee's probationary period lasted at least 9 months;

(B) one week if the employee's probationary period lasted for at least 3 months; or

(C) none if:

(i) the employee's probationary period lasted less than 3 months; or

(ii) the department director terminated the employee for materially falsifying information on the employment application or a document associated with the application or for gross misconduct, such as a violation of the County Charter, Code, regulations, or procedures, State or Federal laws, or a conviction for a criminal offense.

(3) A probationary employee who is terminated may not grieve or appeal the termination or a supervisor's failure to inform the employee that the employee's work performance was marginal or inadequate.

(f) Reassignment of a merit system employee during the promotional probationary period.

(1) The OHR Director may reassign a merit system employee who has been promoted if the employee's performance in the new position has been inadequate during the promotional probationary period. The OHR Director must reassign the employee to a position at the same grade as the employee had before the employee was promoted. The OHR Director must not reduce the grade of, or terminate, another employee to reassign the employee who was promoted.

(2) A department director should notify the OHR Director at least 30 calendar days before the end of the employee's promotional probationary period that the employee's performance in the promoted position is inadequate.

(3) The department director must give the employee at least 30 calendar days written notice of the employee's removal from the promoted position.

(4) A merit system employee who is reassigned during the promotional probationary period may file a grievance under Section 34\* of these Regulations.

(g) Merit system status.

(1) OHR must notify the department director 60 calendar days before the end of a newly appointed employee's probationary period.

(2) The department director may grant merit system status to an employee after the employee completes the required probationary period if the employee's performance, attendance, and conduct were satisfactory during the probationary period.

(3) At the expiration of an employee's probationary period, a department director must:

- (A) grant merit system status;
- (B) extend the probationary period; or
- (C) terminate the employee's appointment.

### 7-3. Use of temporary employees.

(a) Temporary employees other than short-term employees.

(1) A department director may use a temporary employee for up to 40 regularly scheduled hours per week for a maximum period of 12 months.

(2) The CAO may approve an extension of a temporary appointment for an additional 6 months.

(3) A department director may use a temporary employee indefinitely on an intermittent, seasonal, or substitute basis.

(b) Short-term County employees. Short-term employees are a category of temporary employees authorized by Section 33-20 of the County Code.

- (1) A department director may hire a short-term employee:
  - (A) when necessary to promote the efficient operation of the department; and
  - (B) without using an eligible list if the employee meets the minimum qualifications for the position and it is impractical to hire from an eligible list.
- (2) A department director must not employ a short-term employee for:
  - (A) more than 900 hours in a 12-month period; or
  - (B) more than 2 12-month periods.
- (3) The salary of a short-term employee must not exceed the hourly rate for the maximum salary of a grade 5 on the general salary schedule or a comparable pay grade.
  - (c) Use of a temporary position to avoid paying benefits. A department director must not use a temporary position instead of a full-time or part-time position solely to avoid paying benefits to an employee.

7-4. Noncompetitive reappointment.

- (a) A department director may noncompetitively reappoint a former County employee if the individual:
  - (1) is reappointed to a position at the same or lower grade level than the employee held at the time of separation;
  - (2) meets the requirements for the position;
  - (3) passes a physical examination, if required for the position;
  - (4) completed the probationary period before separation;
  - (5) was in good standing at the time of separation and is eligible for reemployment; and
  - (6) applies for reappointment within 5 years after the date of separation.
- (b) The department director must obtain the OHR Director's approval of the noncompetitive reappointment.
- (c) Noncompetitive reappointment is the prerogative of management and not a right or entitlement of a former employee. A former employee may not file a grievance or appeal the denial of a non-competitive reappointment.

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